BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation Provisions	)	
Of the Telecommunications Act of 1996	)	
	)	
Petition of the Independent Payphone Association	)	
of New York, Inc. to Pre-empt Determinations of	)	
the State of New York Refusing to Implement the	)	
Commission's Payphone Orders, and For a	)	
Declaratory Ruling	)	

REPLY COMMENTS OF THE
INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.

In its Petition for an Order of Pre-emption and Declaratory Ruling, the Independent Payphone Association of New York, Inc. (IPANY) showed that the agencies of the State of New York had refused to follow the requirements of this Commission as established in the Payphone Orders. As a result, more than seven years after this Commission required Verizon New York to have in place rates for underlying payphone services which comply with the New Services Test, IPPs in New York are still paying inflated, inefficient, and anti-competitive rates based on embedded costs.

Moreover, through misinterpretation of this Commission's orders, IPPs in New York have been denied the refunds, mandated by this Commission, intended to make them whole as a result of Verizon's unlawful charges. At the same time, Verizon has been unjustly enriched through its receipt of dial-around compensation, which was specifically conditioned upon having valid, NST-compliant tariffs in effect.

Not surprisingly, opposition to IPANY's Petition was filed by a coalition of RBOCs (including Verizon), and the New York PSC, together referred to as the Opponents. On the merits, the opposition arguments are baseless, particularly the claim this Commission has no authority to exercise the power of pre-emption specifically granted - and mandated - by Congress in §276 of the Telecom Act.

The issues now before this Commission revolve entirely on the Commission's intent in issuing the Payphone Orders and the two Wisconsin Orders, particularly the Refund Order. There is no one better able to state that intent than the Commission itself. As pointed out by APCC in its comments, federal courts owe "extraordinary deference" to this Commission's interpretation of its own rules. Capital Network Systems v. FCC, 28 F3d 201 at 206. State agencies and state courts must give even greater deference, if that is possible. Yet the courts of New York have refused to recognize and apply the requirements of this Commission. When state agencies seek to frustrate this Commission's national policies by adopting wholly irrational and unsupported "interpretations" of Commission orders, such efforts should not be countenanced.

POINT A: THIS COMMISSION SHOULD AND MUST PRE-EMPT THE "REQUIREMENTS" OF THE STATE OF NEW YORK WHICH ARE IN DIRECT CONFLICT WITH THE ORDERS OF THIS COMMISSION

There can be no doubt that any provision of New York State law which conflicts with this Commission's Payphone Orders - and the Wisconsin Orders - should and must be pre-empted.[1] Section 276 applies to any inconsistent "state requirements", regardless of whether those requirements take the form of a state regulatory order, legislative act, or court decision. To hold otherwise would be to invite subterfuge, and place the pre-eminence of federal law and policy at the whim of the particular form of action taken at the state level. The Constitution - and Section 276 - are not so meaningless. When a state seeks to subvert federal regulatory policy, in an area where no

[1] No party disputes that Congress has clearly specified this Commission's payphone rules must supercede inconsistent state requirements. Instead, the RBOC's and the PSC argue the agencies of New York State - not this Commission - should interpret the Payphone Orders, and should be free to apply them in a manner directly contrary to the instructions of this Commission.

question exists as to federal pre-eminence, the state's action cannot prevail, regardless of the form taken.[2]

The Opponents claim that, under the doctrine of collateral estoppel, and the requirement to give "Full Faith and Credit" to decisions of a state court, this Commission has no authority to pre-empt the New York rulings. Neither claim is valid.

The doctrine of collateral estoppel does not apply where pre-emption of a state PSC is sought under §276. No determination of the New York courts on the validity of a PSC order binds this Commission (which, of course, was not a party to the New York proceedings). To hold otherwise would be to strip this Commission of the power granted to it by Congress to pre-empt inconsistent state requirements. If a state can decide its policies should prevail over the federal policies established by this Commission, the

[2] For example, the Commission has held that, where local cable TV rate decisions (governed by federal law) are appealed to, and reviewed by, state courts, even in the absence of a specific statutory provision authorizing Commission review of the state court decisions, "We believe we have the authority to pre-empt state court appeals of local rate decisions..." Implementation of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, May 3, 1993, 8 FCC Rcd 5631, at FN 389. Since §276 specifically pre-empts inconsistent "state requirements", the Commission undoubtedly also has the authority to pre-empt state court appeals involving NST refunds which are in conflict with federal law.

power of pre-emption would be purely illusory. That is not what Congress or the federal Constitution specified.

None of the collateral estoppel cases cited by the Opponents, which do not in any event bar this Commission from exercising its power of pre-emption, holds otherwise.[3]

Broadview Networks v. Verizon, cited by the RBOCs at page 15, not only does not help, but actually hurts their case. There, the issue was interpretation of contractual language involving arbitration procedures, with the contractual language to be interpreted as a matter of state, not federal, law. In that case, the Commission voluntarily deferred to the state court interpretation of the contract language, but only after finding the court decision to be a reasonable conclusion, and that it did not raise any "pre-eminent federal concerns". Critically, however, the Commission reserved to itself the right to reject a state court order to arbitrate in "compelling circumstances", such as when "the complaint concerns a dispute that lies at the core of an agency's enforcement mission [or] the dispute inevitably touches commercial relationships among many participants in the relevant industry". Broadview Order, para. 18. Those factors are directly implicated in the issues raised by IPANY, as demonstrated by the two related petitions from IPPs in

[3] This is particularly relevant to the case at bar, where the New York courts, despite knowledge these very issues were already pending before this Commission, declined to refer this matter to the Commission to allow it to interpret the Commission's own rulings.

other states with which the IPANY petition has been consolidated.

There can be no preclusive effect against this Commission (thus preventing it from exercising its power of pre-emption), because it was not a party to any of the proceedings before the state courts. That is made clear in Arapahoe County Public Airport v. FAA, 242 F3d 1213, discussed below, wherein the 10th Circuit refused to apply the doctrine of collateral estoppel to an order of the Federal Aviation Administration which pre-empted the decision of the Supreme Court of Colorado:

> "Last, but certainly not least, the FAA was not a party to, nor in privity with a party to the state court proceedings...Without the FAA as a party, the Colorado Supreme Court decision does not satisfy a fundamental requirement of issue preclusion under federal or Colorado law" [citing Baker v. General Motors, 522 US 222 at 237, 118 S. Ct. 657, to the effect that "In no event...can issue preclusion be invoked against one who did not participate in the prior adjudication".]

Arapahoe County Public Airport, 242 F3d 1213 at 1220.

Here, this Commission has a critical stake in its ability to enforce its own Orders granting waivers to the tariff filing deadlines which were conditioned upon the RBOC promise to make refunds, and in preventing a fraud on the Commission at the hands of the RBOCs. That stake should not and cannot be ignored or dismissed where the Commission was not a party to the state court proceedings.

Arapahoe County Public Airport also makes clear that the common law doctrines of collateral estoppel and res judicata, relied upon by the Opponents, do not prevent pre-emption of a state court decision which violates federal policies and rules:

> "We further agree these common law doctrines extending full faith and credit to state court determinations are trumped by the Supremacy Clause if the effect of the state court judgment or decree is to restrain the exercise of the United States' sovereign power by imposing requirements that are contrary to important and established federal policy".

Arapahoe County Public Airport, 242 F3d 1213 at 1219, cert den 534 US 1064, 122 S. Ct. 664.

The reasoning of Arapahoe County was specifically applied "within the context of the Telecommunications Act of 1996". Iowa Network Services Inc. v. Qwest, 363 F3d 683 at 690 (CA-8, 2003).

The Opponents seek to divest this Commission of jurisdiction, and strip its power to pre-empt inconsistent state court rulings, by relying on the case of Town of Deerfield v. FCC, 992 F2d 420 (CA-2, 1993). Those efforts are of no avail because Deerfield, a case decided before §276's specific pre-emption language was enacted, is not applicable to the pending matter.

There is a critical, and for the Opponents an insurmountable, difference between Deerfield and that which this Commission now faces. In Deerfield, a

homeowner sought an order of pre-emption from this Commission after a federal district court had denied the merits of a pre-emption claim. The entire thrust of the circuit court's opinion was that, under the Separation of Powers doctrine inherent in the U.S. Constitution:

> "A judgment entered by an Article III court having jurisdiction to enter that judgment is not subject to review by a different branch of the government..."

Town of Deerfield, 992 F2d 420 at 428 (emphasis added).

Similarly:

> "Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no power".

Town of Deerfield, ibid (emphasis added).

Here, Deerfield is simply inapplicable because there is no Article III federal court judgment being challenged before the Commission. The order being challenged came from state courts, which of course are not Article III courts, and which are thus fully subject to the pre-emption power of this Commission.

Indeed, Town of Deerfield has specifically been limited, and held not to bar a federal agency from pre-empting the highest court of a state, on the ground Deerfield

applied only when an Article III federal court had issued the challenged decision. Arapahoe County Public Airport Authority v. Federal Aviation Administration, 242 F3d 1213 at 1220, fn. 8, cert den 534 US 1064, 122 S. Ct. 664 (CA-10, 2001).

Similarly, Qwest Corporation v. City of Portland, 385 F3d 1236 (CA-9, 2004) is inapplicable. There, the circuit court held Qwest could not file a federal court challenge to a local ordinance after it had litigated the same issue in state court. But here, there was no attempt by IPANY to relitigate any issue in federal court.

To hold that this Commission cannot pre-empt an improper state court decision would result in an abandonment of this Commission's jurisdiction to recalcitrant state authorities. That would result in casting aside sixty years of federal law which has consistently upheld the authority of this Commission to pre-empt state determinations (including state court determinations) inconsistent with FCC rules.

The "Full Faith and Credit" clause of the federal Constitution (Article IV, §1), does not require federal regulatory agencies to defer to state court decisions which are clearly inconsistent with federal law. (See Arapahoe County Public Airport, and Iowa Network Services, supra.) The only obligation imposed by the Full Faith and Credit clause is for one state to recognize the Judicial Proceedings of another state; it does not require federal agencies with the power of pre-emption to defer to state court decisions which violate federal law.[4] Indeed, the applicable section of the Federal Constitution is

[4] Baker v. General Motors, cited by the RBOCs on page 11 of their comments, deals only with the binding nature of one state's orders in a sister state court.

Article VI, §2, the Supremacy Clause, which states that federal law is the Supreme Law of the Land, and that the Judges in every state shall be bound thereby.

Finally, as this Commission held in its Deerfield Order, where application of collateral estoppel would result in "unfairness", the Commission would not decline to adjudicate the underlying issue. That is the case with the pending matter.[5] The rulings of the New York courts are totally devoid of any rationality, and are manifestly at odds with the intent of this Commission. The refusal of the PSC to follow this Commission's Payphone Orders; the wholly illogical and baseless interpretation of the Refund Order by the New York courts; and the unjust enrichment enjoyed by RBOCs to the tune of hundreds of millions of dollars of dial-around compensation, literally scream unfairness and cry out for relief from this Commission.

POINT B: THE FILED TARIFF DOCTRINE DOES NOT APPLY

The Opponents assert the Filed Tariff Doctrine precludes requiring the RBOCs to grant refunds to the IPPs in New York. That assertion is without merit.

To begin with, the duty of the RBOCs to give refunds arises under federal law, not New York law. Accordingly, the state law cases cited by the Opponents are

[5] See 7 FCC Rcd 2172 (1992). While the Deerfield Order was set aside by the Second Circuit, it was only because a decision had already been issued by an Article III Court. The ability of this Commission to refuse to apply collateral estoppel because of "unfairness", where an Article III Court is not involved, remains in full force.

irrelevant.

It is federal law, as set forth in the RBOC Commitment Letters and this Commission's Refund Order, which require Verizon to give refunds back to April 15, 1997. The Refund Order was a binding regulatory order which governed the validity of Verizon's payphone rates as of April 15, 1997, and created the refund obligation on a prospective basis as of that date. From that point on, the lawfulness of Verizon's rates was conditioned on the subsequent finding of compliance with the NST, and had the same effect - and validity - of any accounting order issued by this Commission.

Finally, of course, is the fact the RBOCs specifically waived, in the RBOC Coalition Letter of April 10, 1997, any claim the Filed Tariff Doctrine might apply:

> "(I should note that the Filed-Rate Doctrine precludes either the state or federal government from ordering such retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance."

Thus, even if the Filed Tariff Doctrine would, as a matter of federal law (or even state law) have precluded refunds (which would not have been the case), any claim to that effect was unequivocally waived.[6]

[6] On page 17 of their comments, the RBOCs assert IPANY "relied exclusively" on Verizon's "supposed" voluntary commitment for its refund claim. That is not correct. IPANY has always made clear the obligation to give refunds arises from both the Verizon pledge and the Refund Order. Moreover, there is nothing "supposed" about the refund pledge. It was clear,

POINT C: THE REFUND ORDER DID NOT LIMIT REFUNDS TO ONLY 45 DAYS

The Opponents argue that even if Verizon were obligated to make refunds, the maximum period of liability would be only 45 days. That assertion is ridiculous on its face.

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unambiguous, effective and fully binding.

The purpose of the Refund Order was twofold. First, it was intended to hold IPPs harmless from the anti-competitive consequences of having to pay inflated payphone rates which exceeded NST costs. The refund obligations was always intended by this Commission to continue until NST compliant rates were in effect, so that the longer the RBOCs stalled in filing lawful NST rates, the longer they would be subject to the refund obligation. Any other reading would simply have encouraged the RBOCs to stall and game the regulatory process, thus prolonging the unfair and inefficient rate structure the Commission was trying to eliminate.[7]

The other purpose of the Refund Order was to establish a quid pro quo, with the RBOCs being allowed to receive lucrative dial-around compensation, so long as they had in effect NST compliant rates - or the equivalent thereof created by the refund liability. The Commission never intended to unjustly enrich the RBOCs by bestowing on them dial-around for unlimited periods of time, but restricting the maximum possible refund liability to 45 days.

Nowhere in the RBOC Coalition Letter commitments, or in the Refund

[7] The Commission made clear the purpose of accepting the RBOC promise to give refunds was "to mitigate any delay in having in effect intrastate tariffs that comply with the guidelines required by the Order on Reconsideration", i.e., the NST. Refund Order, para. 20. The construction urged by the RBOCs, that refunds were limited to only 45 days, would have the exact opposite result.

Order, is there any reference to any time limitation on refunds. To the contrary, the commitment on refunds ran from the time "the new state tariffs go into effect...back to April 15, 1997". April 10, 1997 RBOC Coalition Letter, page 2. This is confirmed in the Refund Order (at para. 20) that refunds would be due "once the new intrastate tariffs are effective". The reference to "the new state tariffs" was to the NST-compliant tariffs which were required to be filed where existing rates exceeded NST rates. Because all the parties recognized there was "no guarantee" the states would act on the new tariffs within 15 days, and indeed might take months (or even years, as has occurred in New York) to review the tariffs, no time limit on potential refunds was ever contemplated or specified by the Commission.

The only timeframe referenced in the RBOC Letters, and the Refund Order, was a period of 45 days (from April 4, 1997) by which the RBOCs would be required to either correctly certify their state tariffs were NST compliant, or to file new tariffs. As discussed at length in IPANY's Petition (pp. 24-27), nowhere did this Commission, or the RBOCs, state that refunds would be required only if a RBOC actually filed NST compliant tariffs within this window.[8] And nowhere was it stated that an RBOC which refused to ever file NST compliant tariffs would be rewarded for its intransigence by

[8] As explained in detail in IPANY's Petition (pp. 7-8, 12) even if a tariff filing within the 45 days were required to trigger the refund liability (which wasn't the case), Verizon did in fact take advantage of the waiver and filed tariff revisions on May 19, 1997 pursuant to the Refund Order. The fact Verizon's tariff filing failed to comply with the NST requirements created the refund liability, rather than extinguished it.

being exempted from refunds.

POINT D: A CONCRETE CONTROVERSY EXISTS WHICH REQUIRES THIS COMMISSION TO ISSUE A DECLARATORY RULING

The RBOCs claim there is "no concrete controversy" presented by IPANY's Petition because the PSC "is currently reviewing Verizon's current rates in light of the requirements articulated in the 2002 Wisconsin Order". (RBOC Comments, page 3). That is a misstatement of the issue before this Commission.

As discussed in IPANY's Petition, the PSC, after a four year proceeding, which refused to follow the Wisconsin Orders, upheld Verizon's pre-existing rates as being compliant with the New Services Test. The reason cited by the Commission was its finding that those rates covered Verizon's embedded costs. On review, the trial court determined the PSC's validation of those pre-existing rates should be set aside because the New Services Test clearly required that rates be based on forward-looking, and not embedded, costs. A remand for further proceedings to correctly apply NST standards was ordered, and not challenged by the PSC on appeal.

Thus, the PSC is still required to determine whether Verizon's rates, as of April 15, 1997, complied with the New Services Test. The issue in controversy is what criteria this Commission intended should be followed in implementing the New Services Test. The PSC, and the New York courts, state that the PSC is not bound to apply the instructions issued by this Commission in the two Wisconsin Orders. IPANY, and IPPs across the country, argue vociferously that any review of pre-existing RBOC rates must

be undertaken in conformance with, at the very least, the holdings set forth in the Wisconsin Commission Order of January 31, 2002.[9]

[9] As discussed in IPANY's Petition (pp. 22-23), this Commission has already ordered reconsideration of state PUC orders which refused to follow the Wisconsin Commission Order. In the Matter of North Carolina Payphone Association Petition for Declaratory Ruling, CCB/CPD 99-27, Order, DA 02-513, March 5, 2002.

Accordingly, it is appropriate that this Commission set forth specific instructions to the PSC that the two Wisconsin Orders were interpretative, and did not create "new law", and accordingly must be applied in judging the validity of Verizon's rates as of April 15, 1997. Providing such instructions was in fact the purpose of issuing both the Wisconsin CCB Order and the Wisconsin Commission Order. Rather than encouraging never ending proceedings, and imposing significant financial costs and delays on the parties, the Commission deemed it necessary and proper to issue instructions, in advance, as to the specific requirements applicable to NST tariffs. The exact same principle fully supports issuing similar instructions to the New York PSC - particularly when the PSC has already stated it refuses to apply the holdings of either the Wisconsin CCB Order or the Wisconsin Commission Order during the remand proceeding.[10]

[10] There are actually two separate proceedings before the PSC. The first, in the required remand, must evaluate Verizon's rates as of April 15, 1997. There, the PSC refuses to apply either of the Wisconsin Orders. The second proceeding was generated by another PSC complaint filed in 2003 (see IPANY Petition, at fn. 13). The PSC has apparently acknowledged it must apply the holdings in the Wisconsin Commission Order in the second proceeding, but has not indicated whether it will do so as of March 17, 2003 or some undetermined dated in the future. It is, however, clear, the very earliest the PSC's NST rate in this second proceeding, in

accordance with the Wisconsin Commission Order, will take effect is 2003 - and certainly not until some time in 2005 or even 2006 if the prohibition on refunds is upheld. Notwithstanding this second proceeding, a "concrete controversy" still exists with respect to the methodology to be applied in the first proceeding, and as to the rates which should have been in effect from April 15, 1997, and in both proceedings as to whether refunds will be required.

At the same time, "a concrete controversy" exists as to whether Verizon will be required to give refunds back to April 15, 1997, or any other point in time, should the eventually NST compliant rates be lower than Verizon's pre-existing rates. New York State has definitively stated that no such refunds would be made - a determination in direct conflict with the requirements of this Commission's Refund Order. It is therefore perfectly appropriate for this Commission to issue a definitive determination on that matter.

Verizon also misstates the history of IPANY's extensive efforts, from early 1997, to obtain NST compliant rates in New York. In response to the PSC's July 30, 1997, Request for Comments on Verizon's payphone tariffs, IPANY specifically asserted that the pre-existing tariffs did not comply with the New Services Test. See September 30, 1997 letter to Daniel M. Martin, Chief, PSC Tariff and Rates Section, Exhibit "B" to IPANY Petition, at page 2.

Verizon also misrepresents IPANY's position on whether IPPs were entitled to receive underlying payphone services as Unbundled Network Elements. At page 7 of the IPANY September 30, 1997, Comments to the PSC, IPANY acknowledged that Payphone Service Providers were not "requesting telecommunications carriers" covered by Section 251(c)(3) of the Telecom Act, and accordingly were not entitled to obtain Unbundled Network Elements in the same manner as Competitive Local Exchange Carriers (CLECs). However, as indicated in the remainder of those comments, IPANY urged the PSC to use the TELRIC rates as proxies for the forward-looking economic costs which were to be the basis for NST rates applicable to IPPs under Section 276 of the

Telecom Act. Nothing in any of this Commission's orders precluded a PUC from using the TELRIC UNE rates as the basis for NST rates; indeed, the Wisconsin Commission Order specifically approved that approach as one option.

Finally, Verizon improperly attempts to fault IPANY for taking "no additional action" with regard to its complaint against Verizon's rates until December 1999. The reason is quite simple. The PSC already had in place an active proceeding in which the validity of these very rates was being reviewed by the PSC. It was only after no action had been taken in that proceeding for more than two years that IPANY sought to reinvigorate the same proceeding by filing a supplemental pleading asking the PSC to expeditiously complete the task it had begun in 1997.[11]

CONCLUSION

For the reasons cited herein, and in IPANY's Petition, this Commission has full authority to pre-empt the determinations of New York State, including its courts, which conflict with this Commission's Payphone Orders. Accordingly, this Commission should issue an Order declaring that the "requirements" of the State of New York which refuse to apply the holdings in this Commission's Wisconsin Orders, and refuse to

[11] The RBOCs also bemoan the fact that IPANY had not asked for refunds until the second petition was filed in 1999. But any request for refunds prior to that date, while the PSC was reviewing the validity of Verizon's pre-existing rates, would have been premature. It would only be upon a finding that those pre-existing rates were higher than appropriate NST rates that a cause of action for a refund would accrue; the time to demand such a refund would not actually start to run until the cause of action had actually accrued. Indeed, it could be argued that any request for refunds made by IPANY would be premature until such time as the correct NST rate is determined.

recognize the right of IPPs to refunds, are inconsistent with federal law and are superceded.

RBOCs cannot be allowed to enjoy the benefits of their bargain while refusing to comply with the burdens. If they refuse to file NST-compliant tariffs, and refuse to make the promised refunds, they cannot be allowed to keep their dial-around compensation. As the Commission made clear in Para. 25 of the Refund Order, that Order "does not waive any of the other requirements with which the LECs must comply before receiving [dial-around] compensation". Those "other requirements" included the prior effectiveness of NST compliant tariffs and the granting of refunds back to April 15, 1997.

Respectfully submitted,

/S/
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